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**Before the**
FEDERAL COMMUNICATIONS COMMISSION
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
| | ) | |
| **Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended** | ) | **WT Docket No. 99-87** |
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Directed to: The Commission**

## REPLY TO OPPOSITION OF PCIA

AllCom, LLC ("AllCom"), by its attorneys and pursuant to the provisions of section 1.429(g) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.429(g) (2000), hereby submits this Reply to the Opposition submitted by the Personal Communications Industry Association, Inc. ("PCIA") on March 8, 2001. PCIA opposed AllCom's January 31, 2001, Petition for Reconsideration ("Petition") of the FCC's *Report and Order* ("*Order*") in the above-captioned proceeding.[1] AllCom's Petition requested that the agency reconsider its decision to adopt a five-year "holding period" ("Restriction") before certain licensees of non-Specialized Mobile Radio ("SMR") frequency assignments above 800 MHz are permitted to convert those frequency assignments for SMR use, or convey them to an SMR licensee.

PCIA states that the Restriction should remain in place, claiming that its elimination would "result in a wholesale reallocation of the [Business and Industrial] Pools to SMR entities." Opposition at 2. PCIA does not address, however, AllCom's supported claim that the FCC's creation of various categories of "users" for which 800 MHz spectrum is allocated was solely intended to track marketplace demand for spectrum, Petition at n.5, not artificially

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1 *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, rel. Nov. 20, 2000. See also 66 Fed. Reg. 33 (Jan. 2, 2001).

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block that demand. Yet, that is precisely what PCIA would have the Commission do: maintain the Restriction is spite of overwhelming evidence that the demand for commercial spectrum far outpaces the demand for internal-use spectrum.

PCIA also does not articulate how the Restriction serves its intended purpose. In most areas, one-hundred percent of the available Business or Industrial frequency assignments have already been licensed. Pursuant to the rules adopted in the *Order*, those already-licensed frequency assignments may now generally be freely conveyed to SMR licensees. It is only in those areas where Business or Industrial spectrum remains available that the Restriction has any effect. Thus, the Restriction only serves to block SMR licensees from acquiring non-SMR spectrum where the demand for internal-use only spectrum is weakest - an odd regulatory result for a policy that was initially intended to track marketplace demand.[2]

Acknowledging the weakness of its argument, PCIA states that "where appropriate" the Commission should waive the Restriction. Opposition at 2. AllCom has submitted concurrently herewith a Request for Waiver ("Request") of the FCC's rules, and includes it in the record of this rule making proceeding. See **Exhibit A.** AllCom's Request demonstrates that the Restriction and similar policies have resulted in all available Industrial frequency assignments remaining fallow in the Anchorage area ever since they were initially allocated by the Commission. Accordingly, PCIA can no longer claim that the issues raised by AllCom are "speculative." Opposition at 2.

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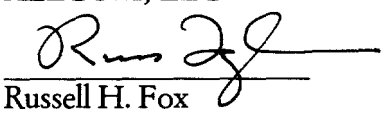
[2] PCIA raises the argument, fully discredited by the Commission in other contexts, that internal-use only users will be without options if the Commission permits the flexible use of 800 MHz frequency assignments. Opposition at 2. This argument assumes that large power companies and similar entities are somehow unable to compete with SMR licensees for frequency assignments in the primary or secondary markets and, in any case, has never been proven by its proponents.

**WHEREFORE, THE FOREGOING PREMISES CONSIDERED,** AllCom again respectfully requests that the FCC reconsider its decision to implement a five-year holding period for applicants that secure non-SMR licenses based on applications submitted after November 9, 2000.

Respectfully submitted,

**ALLCOM, LLC**

By: 

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## Certificate of Service

I, Joanne Hughes, a secretary in the law firm of Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., certify that I have this 20th day of March, 2001, caused to be sent via first-class U.S. mail a copy of the foregoing Reply to Opposition to the following:

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DCDOCS:192661.1(44NP01!.DOC)

# Exhibit A

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Request for Waiver of Rule 90.617(b)** | ) | **ULS File No. _____** |
| **AllCom, LLC** | ) | |
| | ) | |

**Directed to: Chief, Wireless Telecommunications Bureau**

## REQUEST FOR WAIVER

AllCom, LLC ("AllCom"), by its attorneys and pursuant to the provisions of section 1.925 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission), 47 C.F.R. § 1.925 (2000), hereby requests waiver of the provisions of section 90.617(b) of the FCC's rules (the "Rule"), which otherwise limits the assignment of certain frequencies in the 851-866 MHz ("800 MHz") frequency band in non-border areas to entities eligible in the Industrial/Land Transportation ("Industrial") Category.[1] As set forth more fully below, issuance of a waiver to AllCom will serve the public interest.

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[1] Because it is considered a feeable application, the original-signature version of this request for waiver has been submitted to the FCC's Mellon Bank "lockbox." The application ("Application") associated with this request for waiver was submitted to the authorized frequency coordinator for the Industrial/Land Transportation radio service - the Industrial Telecommunications Association, Inc. ("ITA").

## I.

## BACKGROUND.

### A. AllCom.

AllCom is an 800 MHz Specialized Mobile Radio ("SMR") licensee that provides two-way radio services in Alaska. AllCom is authorized to provide SMR service through various licenses that it acquired from existing SMR operators and individuals whose facilities it (and AllCom's predecessor entities) managed. Unlike some other commercial mobile radio service ("CMRS") providers, AllCom is not authorized to operate any geographic area licenses which might otherwise provide it with the ability to re-use frequency assignments within a particular geographic area. Each of AllCom's licenses are site-specific, were already required to have been, and in fact have been, constructed and placed into operation.

AllCom is the final stages of constructing and implementing an SMR system in Alaska with Motorola's iDEN technology based on its 800 MHz SMR licenses. To the best of AllCom's knowledge, its iDEN system will be the fourth such SMR-based digital wireless system in the United States; other iDEN systems are operated by Nextel Communications, Inc., the Southern Company, and Pacific Wireless Technologies, Inc. The Commission has previously recognized the benefits of iDEN technology. See *Geotek Communications, Inc.*, 15 FCC Rcd 790, ¶ 41 (2000) ("For example, Motorola's iDEN technology . . . has increased spectrum capacity three- to six-fold compared to analog systems."); see also *CMRS Fifth Report to Congress*, FCC 00-289, Section II(4)(a), rel. August 3, 2000 ("By increasing capacity, digital technologies have enabled SMR providers to become more significant competitors in mobile telephone markets."). AllCom will also be the first entity to bring the powerful combination of mobile telephony/dispatch features of iDEN to Alaska.

B. The Rule.

The Motorola iDEN transmission equipment employed by AllCom will generally operate on any 25 kHz frequency assignments in the 800 MHz frequency band. However, the Rule provides that:

> The [fifty Industrial] channels listed in Table 2A are available to eligible applicants in the Industrial/Land Transportation Category (consisting of Power, Petroleum, Forest Products, Film and Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab, and Automobile Emergency licensees, as defined in §90.7).

47 C.F.R. § 90.617(b) (2000). AllCom recognizes that it is not an "eligible" applicant in any of the Industrial categories specified by the Rule.[2] Therefore, AllCom requires that the FCC grant a waiver of its rules in order to grant the Application, which specifies the proposed use of twenty (20) Industrial frequency assignments for an SMR transmitter site in downtown Anchorage.

II.

DISCUSSSION.

A. Waiver Criteria.

Section 1.925 of the FCC's rules states that the FCC will issue a waiver where the applicant can show either that:

> (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
>
> (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

[2] AllCom believes that FCC licensing policies that sort Part 90 applicants by line-of-business are out-dated, overly-regulatory approaches to spectrum management that have been rejected by the FCC in recent decisions.

47 C.F.R. § 1.925(b)(3) (2000). Rule 1.925 does not change prior FCC decisions, which alternatively permit a waiver where "good cause" is shown. 47 C.F.R. § 1.3 (1999); see also *GTE Wireless of the Pacific, Inc.*, DA 00-1525, ¶ 3, rel. July 6, 2000. The U.S. Court of Appeals for the D.C. Circuit has noted that the Commission's discretion to resolve difficult issues with general rules is intimately linked to the existence of a "safety valve" procedure for granting an exemption based on special circumstances. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969, cert. denied, 409 U.S. 1027 (1972).

B. **Application of Waiver Criteria.**

AllCom seeks waiver under the second alternative test established by rule section 1.925. In particular, AllCom demonstrates that, in view of the unique factual circumstances present here, application of the rule would be contrary to the public interest.[3]

AllCom is one of a handful of 800 MHz licensees operating in Alaska. Commercial operators and private users in the state generally deploy what are (rightly or wrongly) regarded to be more reliable very high frequency ("VHF") or ultra high frequency ("UHF") radio systems. As a result, the 800 MHz non-SMR frequency assignments made available by the FCC nearly twenty years ago are barely used. **800 MHz Industrial frequency assignments, in particular, are not used at all with 100 miles of AllCom's proposed transmitter site**, at least insofar as AllCom is able to determine.[4] AllCom is therefore the first applicant that desires to make any productive use of this Industrial spectrum in this area. This, of course, is factually unique compared to the remainder of

[3] The Commission often states that its rules require waiver applicants to demonstrate that they face "no reasonable alternative." However, rule 1.925 clearly states that a demonstration of "no reasonable alternative" is only one of several avenues available for waiver relief. In any case, AllCom demonstrates that it has no reasonable alternative absent waiver relief.

[4] Even 800 MHz frequency assignments in the Business Radio service category, which are available to a broad range of eligible users and are available without auction participation, are lightly-licensed in the state of Alaska. With respect to 800 MHz Industrial frequency assignments, their licensed use in other areas of Alaska is generally limited to the North Slope, and one licensee in the Fairbanks are.

the United States, where 800 MHz frequency assignments, whether Industrial or SMR or Business category, are heavily used.

This is a regulatory problem that has uniquely affected Alaska. The Commission's initial allocation of additional 800 MHz frequency assignments was intended to replicate marketplace demand among the various "categories" of user eligibility. 90 FCC2d 1281, ¶¶ 51-52 (1982) (allocating remaining 800 MHz spectrum in pools, citing goal of ensuring that "user spectrum demands are met."). Clearly, at least with respect to Industrial frequency assignments, the FCC predictive judgments missed Alaska's marketplace demand by a wide mark. With a demonstrated record of almost twenty years of no demand for 800 MHz Industrial frequency assignments in the Anchorage area, the Commission must take action.

AllCom, as noted above, is prepared to put the twenty (20) frequency assignments specified in the Application to immediate use in its digital iDEN mobile telephony system. AllCom was formed and organized too late to participate in the FCC's spectrum auctions for the 800 MHz SMR service; however, as an iDEN service provider with a desire to provide advanced data and voice services, AllCom's spectrum requirements may soon outpace its frequency holdings in the Anchorage area. Further, it is expected that many of AllCom's end users will themselves be Industrial eligibles. However, these end users are generally unable to construct their own two-way radio systems due to the harsh operating conditions and special experience necessary to operate a mobile telephony system in Alaska. The Commission has recognized the unique nature and climate of Alaska in a previous case where it waived the 90-day CMRS discontinuance rule for a cellular licensee. *Alaska RSA 1 General Partnership*, 13 FCC Rcd 8043 (1997). AllCom's Alaska-area general manager has extensive experience in this area, having already built-out a wide-area cellular system in Alaska.

AllCom's request for twenty (20) frequency assignments is a measured and reasonable approach to its projected 800 MHz frequency needs. The initial assignment of twenty frequency assignments is also consistent with the FCC's regulations for 800 MHz trunked radio systems,[5] 47 C.F.R. § 90.627, and does not require the issuance of an additional waiver. Moreover, grant of this request for waiver will only "use" 40% of the Industrial frequency assignments available, and only in a small portion of the state. Given the previous complete lack of demand for this spectrum, and AllCom's limited request, no credible argument can be made that issuance of a waiver will deprive the Industrial radio community of any necessary communications tools.[6] In fact, as noted above, with the FCC's issuance of a waiver to AllCom, many Alaska-area Industrial eligibles will, for the first time, be able to enjoy the feature-rich benefits of iDEN technology.

AllCom is aware of recent FCC precedent which suggests that a shortage of spectrum, standing alone, is not a unique or unusual circumstance requiring the issuance of a waiver. See *License Communications Services, Inc.*, 13 FCC Rcd 23781 (1998) ("*LCSI*"). However, this case is different because there is an abundance of 800 MHz spectrum in Alaska; the only "shortage" was created by artificial regulatory distinctions that were intended to track marketplace demand, but failed. In *LCSI*, there was a true shortage of spectrum; that case involved Los Angeles area radio systems. *LCSI* also involved frequency assignments that were available in another FCC radio service. Here, by contrast, the frequency assignments at issue are issued under the same rule part,

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5 iDEN radio systems are not "trunked" as defined by the FCC's regulations because channels are not assigned by a central controller so much as they are by a network switch. However, similar to trunking technology, iDEN systems are efficient users of frequency assignments.

6 FCC policies favor the productive use of frequency assignments. See *Amendment of Section 73.202(b), Table of Assignments, FM Broadcast Stations*, 62 FCC2d 76, ¶ 12 (1976) ("[W]e see little benefit to the public interest in allowing a channel to lie fallow and unused"). The Commission has also stated that fallow spectrum "is the least efficient alternative." *Loading Requirements in 47 C.F.R. Sec. 21.710(d) For Operations in the 10.7 - 11.7 GHz Frequency Band*, 11 FCC Rcd 1911, ¶ 10 (1996).

with the same technical regulations, and, due to the previous availability of intercategory sharing, often licensed as SMR frequency assignments in other parts of the United States.

This case is further unlike *LCSI* because the requested waiver relief in this case is also temporary in nature.[7] The FCC recently amended its regulations to permit Industrial licensees to convey their Industrial frequency assignments to SMR licensees for conversion to commercial use. *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, rel. Nov. 20, 2000. See also 66 Fed. Reg. 33 (Jan. 2, 2001). Therefore, the Rule has been eliminated in most areas of the country. AllCom would take advantage of this regulatory breakthrough in Alaska, but there are no holders of 800 MHz Industrial spectrum in the Anchorage area from which AllCom could secure these frequency assignments![8] Thus, due to the operation of the FCC's new policies in this one particular market,[9] AllCom cannot do what every other SMR licensee in the remainder of the United States is permitted to do - secure Industrial frequency assignments in the secondary marketplace for use in its SMR system. Thus, because the FCC already acted to permit Industrial frequency assignments to be employed for SMR purposes, this case is unlike *LCSI*.

Because the FCC has already correctly changed its policies to permit the marketplace to shift unused or underused 800 MHz spectrum to commercial use where appropriate, denial of this request for waiver will contravene the public interest because it will not permit that policy to be

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7 Requests for temporary waivers are considered more leniently than permanent requests for waiver. See *Pegasus Broadcasting, LLC*, 14 FCC Rcd 13767, ¶ 35 (1999).

8 AllCom therefore has no reasonable alternative; it cannot enter into transactions with Industrial licensees that do not exist. AllCom's iDEN system will also not function with non-800 MHz frequency assignments.

9 The FCC permitted the conveyance of Industrial frequency assignments to SMR licensees under marketplace theories of supply and demand. The irony for AllCom is that the lack of demand for 800 MHz Industrial frequency assignments should be a factor promoting the assignment of such spectrum to SMR licensees. Here, the lack of demand, combined with operation of the Rule, hinders that marketplace shift.

implemented in that area of the country where it is most appropriate, and for a provider that is bringing innovative iDEN services to that area.

## III.

## CONCLUSION.

**WHEREFORE, THE FOREGOING PREMISES CONSIDERED,** AllCom respectfully requests that the FCC waive the provisions of section 90.617(b) of its regulations to permit AllCom to implement its iDEN system in Alaska.

Respectfully submitted

**ALLCOM, LLC**

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